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nary corrupt witness and should not be criticized for deliberately hiring a corrupt expert. . . . A man who knowingly and habitually uses perjury is not very different from a perjurer" (p. 330).

It is not often that we can say of a law book that it unites technical excellence with broad human interest. Such a book Mr. Osborn has produced. He has done this because he is a man who combines in a rare degree the powers of observation and reflection. He is both an observer and a student. Of the importance of the spirit of study, he himself says:

"One of the greatest differences in workers in all fields is the degree of their inspiration by the student spirit, that attitude of mind that makes practical life a constant course of study. The education of men of this latter class is only finished when life is finished" (p. 232).

The author himself is clearly a man of this type. Not every man of the student spirit, however, possesses the remarkable power of insight which this volume reveals on every page. The author sees as well as thinks; and it is the keenness of his vision which gives wisdom to his reflection. He is endowed with "an experiencing nature."

In the excellent bibliography attached to his book, the author makes this remark:

"Influenced as he is by the conditions that surround him, the professional man is inclined to be a narrow man. The truth is that in many cases his general mental development stops when his practice begins, and of all men he is in special need of intellectual stimulus outside of his narrow technical field" (p. 492).

The wide range of reading of the author is revealed in the list of books in the bibliography. We believe that few of these books—and some of them are famous volumes—can be read by the lawyer with a greater sense of sustained interest and of mental enlargement than Mr. Osborn's work on "The Problem of Proof."

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AN INTRODUCTION TO THE PHILOSOPHY OF LAW. By ROSCOE POUND. New Haven: YALE UNIVERSITY PRESS. 1922. pp. 307.

It is fortunate that the first American book to dare to put *philosophy of law* in its title, is written by one who has not only been our foremost legal scholar but has also had experience at the bar and on the bench. The prestige of the latter is needed to overcome the deep prejudice of the "practically" minded against any avowedly theoretical treatment of the law. This prejudice is not altogether baseless. The vagaries of transcendental philosophers have been as inapt in the law as in the natural sciences. But bad metaphysics cannot be avoided by ignoring philosophy and burying our heads in the sands after the manner of the ostrich—witness the ultra "practical" lawyers who involve themselves in metaphysical quagmires by speaking of *mens rea,* or the "meeting of minds" in contract, or "the will of the legislator" in circumstances which no legislator could have foreseen. These confusions are not of merely intellectual interest—they are decisive of the way in which the law is to meet the human needs which it ought to serve. Thus the metaphysical theories of natural rights and free-will have led courts to nullify legislative efforts to protect otherwise helpless workmen against the economic oppression of company stores, payment in truck, etc.

Because of the need for the recognition of the essentially practical character

of legal philosophy I propose to pay more attenton to the second half of Pound's book, dealing with the great substantive branches of the law, *viz.*, liability, property, and contract.

The chapter on Liability is in the main devoted to the historical and analytic motives of the theory that the law does and should put liability only where there is fault—a dogma which led the New York Court of Appeals into an unfortunate conflict with enlightened public opinion in the famous *Ives* case.[1] Dean Pound has no difficulty in showing that this dogma does not agree and never has agreed with all the facts of our legal system, that actually we hold men liable who have committed no fault whatsoever and have in fact used every possible precaution. Thus we hold the master of a ship, an inn-keeper, or a common carrier absolutely liable for certain goods no matter how much care he has taken. In many cases of legal "negligence," the culpability is clearly fictional. Men are "deemed" or "presumed" to be culpable because the law holds them liable, not because they are in fact, or in any real sense of the word, at fault. Hence those who try to maintain the consistency of the established theory tread on the tail of their own argument (p. 160). The notion of "fault" is, indeed, ethical in its origin, and comes into the law, according to Pound, only in the stage of equity or natural law with the metaphysical idea of free-will. As a generalization it did great service in systematizing the law of torts, and thus improved and humanized the administration of justice. But it never can altogether replace the older standard of acting at one's peril where others must be protected from the harmful results of one's ignorance and awkwardness as well as insufficient care and downright aggression. Dean Pound thinks that all the facts of legal liability can be deduced from what he calls the four postulates of civilized life. Civilized man must assume (1) that he will not be interfered with by willful aggression, (2) that others will act with due care, (3) that others will restrain potentially dangerous things or agencies in their control or employ, and (4) that those with whom he deals in the general course of society will act in good faith. From these postulates follow not only the law of tort but also the law of contracts and the large number of obligations that can be viewed as either, or are in fact neither.

The hitherto current ethical-metaphysical theory of liability based on fault, is, no doubt, inadequate; and Dean Pound's theory has all the analogies of science and engineering in its favor. But I regret that he has left out of account the insurance theory of liability, *i. e.*, that in the imperfect state of human knowledge and capacity there are bound to occur mistakes, accidents, and other unpreventable losses, and that those losses should be borne in the first instance by the party in the better position to insure against them. Thus with regard to industrial accidents the employer is held liable because he is in a better position to figure the cost of insurance in advance and add it to the legitimate cost of production. I venture to think that without the principle of insurance, as a method of social distribution of inevitable losses, Dean Pound's theory will be found incomplete. Moreover the insurance theory of liability is clearly supplementary rather than antithetic to an objective theory of fault. Where the losses are in any way avoidable an objective standard of fault is applicable to the extent that it makes for the utmost possible care, but where experience has shown that no amount of care will eliminate certain losses, the cost of these necessary incidents of the social process should not be borne by the accidental victim.

In the chapter on Contract, Dean Pound traces, with his usual rich and varied learning, the history of the fundamental ideas of contract both in the civil and in the common law. He thus shows how it comes about that the civil law is superior in protecting promises by making specific performance rather than

[1] *Ives* v. *South Buffalo Ry.* (1911) 201 N. Y. 271, 94 N. E. 431.

money reparation the rule. On the other hand he rejects the civil law theory (which has exerted so much influence on the common law through the followers of Austin and Maine) that the law gives effect only to the free agreement of two wills. The law actually protects an objectively evinced promise and pays little attention to subjective intentions as such. Dean Pound rejects with equal emphasis the equivalent and the bargain theories of contract and the doctrine of consideration which they involve.

Against the doctrine of consideration it is urged that our text-books have not agreed on any formula for it, nor our courts on any consistent scheme of what it does and what it does not include. In any case consideration need not be real and its inadequacy is always immaterial. An imposing catalogue of situations is given in which our courts are enforcing promises that are not bargains (pp. 272-273) or do not involve even technical consideration (p. 274).

The doctrine of consideration has persisted, according to Pound, partly through the too naive belief that the common law represents an eternal legal order, and partly through the widespread belief that "talk is cheap" and not always to be taken at its face value. This, however, should not be pushed so far as to interfere with the ordinary course of business which depends on the reliability of promises. At this point, remembering the previous emphasis on the need of being able to rely on the acts of others as the basis of all obligation, the reader may expect Dean Pound's adherence to the injurious-reliance theory of contracts, *i. e.*, that promises are enforcible because they have been relied on by the promisee to his injury. Actually, however, he expressly rejects this view without giving direct reasons. He is intent on establishing a positive basis for the law of contracts in the fact that expectations based on promises are the very substance of wealth in a commercial age, "that a man's word in the course of business should be as good as his bond, and that his fellow men must be able to rely on the one equally with the other if our economic order is to function efficiently."

While the last propositon is in general true, a certain distinction may well be added. It is not true that all business demands such a standard with equal urgency. Contrast the case of a stockbroker with that of a real-estate broker. The former could do very little business on the floor of the stock-exchange without the strictest reliance on the spoken word. But if a benevolent jurist were to offer real-estate brokers a law making every oral promise enforcible, they would certainly not rush to accept it, perhaps not more than professional diplomats. The reason is that most people do not like to be in a position where a hasty word or one uttered in a weak moment may involve very heavy obligations. In this fact, it seems to me, we have a psychologic reason why people generally want the law to bind promises only when they are accompanied with some formality or solemnity.

The chapter on Property is also in the form of an historical and analytic sketch of the main theories which have prevailed, and Dean Pound pertinently remarks that hitherto "theories of property . . . have not shown how to build, but have sought to satisfy men with what they had built already." Philosophically this is expressed by saying that they have taken the existing order as a picture of the necessary and universal. In doing this they have frequently relied on arguments which appeal more to good will than to facts and logic. Thus the identification of private property with liberty or personality generally presupposes that property consists of goods which are objects of purely individual or personal enjoyment. But as modern property is for the most part in the instrumentalities of production, the rights of property are also rights to limit the liberty and personality of others who are dependent on these tools to be productive. Juristically, however, the great argument against metaphysical theories of

absolute rights of property is not merely that they all import into their premises that which they wish to prove, but that they are futile in that they fail to give us any light as to what *is* private property under given circumstances. Thus they do not tell us, *e. g.,* when an inheritance tax is confiscatory, nor even to what extent the right of controlling things after one's death is essential to private property. The actual variations in the power of disposing goods by will, and the fact that no civilized country is without restrictions on the *jus disponendi,* are matters inadequately dealt with by such absolutistic theories.

Dean Pound's own view is that the law of property is the attempt to realize the postulate of civilized life that men may control "what they have discovered and appropriated to their own use, what they have created by their own labor and what they have acquired under the existing social and economic order." With regard to these three sources of property it may be noted that they are not coördinate, that while the first two have been emphasized in the history of the subject, the third is really the most inclusive category. The right to appropriate what one has discovered is obviously of very limited application in modern life; and the right to the full produce of one's labor is practically meaningless in a society where the division of labor is so complex that no one is ever in a position to tell what part of any object or process a single individual could have produced or invented by his own unaided labor. The actual relative monetary value of the different services which enter into the creation of any economic object is obviously itself the result of the existing social economic order (including the legal rules which it employs). Hence, Dean Pound's postulate is simply the general postulate of legal order, that everyone should be protected in the possession of that which he has acquired under the existing legal rules, whatever they be. That this is not a mere tautology can be seen in the large and almost central role which it assigns to rights by prescription. Prolonged possession creates expectations and it is the essence of the legal order of civilized society to make reliable expectations possible.

There is, however, a serious misunderstanding involved in the popular view that the law of property merely protects what a man has already acquired. Modern property law, in fact, not only regulates conflicting claims to possession of goods already in existence, but by protecting such rights as that of drawing interest, profits, etc., determines the future distribution of the social product. The right to enjoy individual possessions would be of relatively little importance without the right of acquisition. The average life period of modern capital goods, such as tools, machines, ships, etc., is so short that a law which merely protected possession or even the exploitation of existing goods would leave the door open to the most radical transformation of society. We must remember that while mankind as a whole acquires its goods by working on external nature, individual man in socialized industry acquires his goods mainly by social coöperation, and his share is fixed not by nature but by social rules. Hence, while the postulate of legality indicates that it is generally preferable to conform to the existing rules whatever they are than to take the chance of the "waste and friction involved in going to any other basis," it is of course not true that any set of property laws is as good as another. The choice between them must involve political as well as social-economic considerations. For property law is not merely a method of protecting the "instinct" of acquisitiveness and the individual claims grounded therein, but is also a system of distributing power over the means of production; and in the last analysis the justification of any particular system of distributing economic power is whether such a distribution will tend to further a greater production of that which is deemed good for human life.

Dean Pound's learning on all related subjects is so accurate and up to date

that it is surprising to see him bring in the antiquated notion of an "instinct of acquisitiveness." Men's actual desires for acquisition and exclusive possession are certainly not congenital but depend on all sorts of social conditions. The Esquimos cannot understand the idea of private property in food which any individual has acquired, and many civilized people find it difficult to understand the Indian's idea of private property in his personal song. It may be well to note in passing that modern anthropology also indicates that the progress from collective to private property is by no means a universal rule, that development in the contrary direction also occurs frequently.

In the first three chapters, The Function of Legal Philosophy, The End of Law, and The Application of Law, is stated explicitly what in the more concrete chapters is brought out implicitly, *viz.*, that while legal philosophy involves us in many difficulties in trying to make the facts of legal life fit in with systematic theories, this search for system is not only unavoidable for a rational grasp of the subject but indispensable for a human and effective administration of justice. It helps us to harmonize conflicting rules and to decide which of two competing tendencies or analogies in the law is to be favored in new lines of cases. Even purely negative criticisms of prevailing doctrines tend to keep such doctrines more fluid so that the law which they help to mould becomes better adapted to its human ends.

Dean Pound's book is not only a great credit to American scholarship, but heartening to all those who still believe that human affairs need the light of reason.

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